Supreme Court, U.S.
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No. 91-1820

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

PLUMBERS AND PIPEFITTERS LOCAL UNION NO. 520,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and CATALYTIC, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF OF RESPONDENT CATALYTIC, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the National Labor Relations Board may give deference to the pre-arbitration settlement of an individual employee's grievance, which is accomplished through the mutual acceptance by the employer and the union of a recommended decision of fourteen International Union representatives issued after hearing presentations from both the employer and the union at Step III of the contractual grievance procedure.

RULE 29.1 LISTING

Catalytic, Inc. now does business as **UE&C-Catalytic, Inc.** It is a wholly owned subsidiary of

United Engineers & Constructors International, Inc.

which is a wholly owned subsidiary of a publicly traded company,

Raytheon Co.

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Respondent Catalytic, Inc. respectfully requests that the Court deny the Petition for Writ of Certiorari, seeking review of the opinion of the United States Court of Appeals for the District of Columbia Circuit in this case.

STATEMENT OF THE CASE

Catalytic, Inc. is a contractor which provides various types of continuous maintenance services to, *inter alia*, owners of nuclear power generating stations, including Philadelphia Electric Company ("PECO") at PECO's Peach Bottom nuclear generating station in Delta, Pennsylvania. The terms and conditions of employment of Catalytic's craft employees at Peach Bottom are governed by a collective bargaining agreement known as the General Presidents' Project Maintenance Agreement ("the GPA") to which Catalytic and fourteen International building trade unions are parties.[1] The GPA is a collective bargaining agreement which has been negotiated on a national basis, and which has been placed in effect at a variety of maintenance sites through agreement of the interested contractor and the International unions.[2] Among the International unions which are parties to the GPA is the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada ("UA"). The local affiliate of the UA at Peach Bottom, which supplies pipefitters to Catalytic at that site, is Local 520.

The GPA contains several provisions which are material to the matter before the Court. First, Article II, Section 1(A) of the GPA provides that Catalytic has the complete authority and right to plan, direct and control the operation of all of its work. Paragraph 1(I) of that

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1. Petitioner Plumbers and Pipefitters Local Union No. 520 ("Local 520") is not a party to the GPA, but supplies pipefitters to the site through its hiring hall.

2. The GPA was first negotiated in 1956 because the continuous maintenance industry at that time was dominated by non-union contractors. The union contractors and the International craft unions therefore desired to create a bargaining agreement which would include uniform and favorable conditions of employment for such work, regardless of the terms of local construction agreements, to permit them to be more attractive to site owners such as PECO. The history of the GPA is summarized in the Board's decision in *Catalytic, Inc.*, 212 N.L.R.B. 471 (1974).

same article permits Catalytic to discharge or discipline employees for proper cause. Article VII of the GPA creates a comprehensive grievance and arbitration procedure which contains four steps. The first step requires a grievance to be discussed by the aggrieved employee or his on-site representative and the Catalytic supervisor involved. If the matter is not resolved at that stage, it is then discussed at step II between an International union representative and Catalytic's Labor Relations Manager. If the matter remains unresolved, it proceeds to step III, and is submitted in writing to the General Presidents' Committee ("GPC"). *The GPC is a group comprised solely of representatives of the International unions who are parties to the GPA.*

At step III of the grievance procedure both Catalytic and the International union involved in the dispute make presentations to the GPC. The GPC thereafter issues a recommended decision, which is then reviewed by both Catalytic and the involved International union. If either side is dissatisfied with the recommended decision, it has a right to proceed to step IV of the grievance procedure, which is submission of the dispute to an independent arbitrator. If the matter is not submitted to arbitration, the recommended decision of the GPC becomes final and binding on Catalytic and the International union involved in the dispute.

The Discharge Of Garland Berry

Shortly before Labor Day, 1985, Catalytic was given a job assignment by PECO involving the removal and repair of snubbers. Catalytic advised PECO that the snubber work would be performed by pipefitters. Because PECO had been dissatisfied with the manner in which the pipefitters had performed work at the site previously, and because PECO preferred to have the repair work on the snubbers performed by millwrights, PECO gave to Catalytic only the responsibility for removing and reinstalling the snubbers. The responsibility for performing the repair work on the snubbers was

retained by PECO, as it was permitted to do under the GPA, and it was eventually given to another contractor.

Local 520 was displeased with PECO's decision, and demanded that Catalytic "hold a gun to PECO's head" and advise PECO that Catalytic would perform the snubber job only if it were given all of the work involved. Catalytic refused Local 520's demand.

In order to perform the snubber job efficiently, Catalytic had decided to change the schedule of the eight pipefitters on the job from eight employees working on the day shift to four employees working on the day shift and four employees working on the second shift. That changed shift schedule was to be implemented on the Tuesday after Labor Day, and the affected pipefitters were so advised.

Garland Berry, who was the pipefitters' steward, was told by Local 520 that it was not "going along with the splitting of the shifts," and that he was to tell the four pipefitters involved that they were to report as usual for the 7:30 shift on the Tuesday after Labor Day. Berry instructed the men that they were to disregard Catalytic's assignment, and to report on the day shift on the following Tuesday.

Through the intervention of the UA, Local 520 eventually agreed that the shift would be manned as scheduled by Catalytic on the following Tuesday, and Catalytic agreed to maintain the status quo until such time as the entire matter could be discussed. Berry was eventually discharged for gross insubordination, and a grievance was filed on his behalf.

The Grievance Proceedings

Within a week or two after Berry's discharge, Berry and a Local 520 representative met in Washington with two representatives of the UA for the purpose of discussing the background of Berry's grievance. During that meeting, the representatives of the UA were given the facts of the incident leading up to the accusations of gross insubordination against Berry, including the

events taking place prior to Labor Day. The representatives of the UA were also advised that Local 520 had voted not to man the changed shift on the Tuesday after Labor Day, contrary to the direction of Catalytic. The participants in the meeting also discussed the fact that PECO had been unhappy with the pipefitters, the manner in which PECO had assigned the snubber job, and the fact that Local 520 had taken the position that it would refuse to work with the contractor to whom the repair of the snubbers had been assigned.

The grievance eventually proceeded to the GPC pursuant to step III of the grievance procedure. Catalytic submitted a comprehensive written position statement, which provided the GPC with a complete set of facts concerning the background of Berry's discharge. The UA also presented a written position statement, which was based upon its investigation of the facts and its meeting with Berry and Local 520.

After hearing the presentations, the GPC met and considered the issue. Frank Coyne, a UA representative and a member of that Committee, was present during the deliberations and was in a position to elaborate, if necessary, on the position of the UA. The GPC announced its decision on January 31, 1986, which stated that Berry was to be made eligible for rehire immediately with no back pay. Catalytic and the UA accepted the decision of the GPC, which thereafter became final and binding on them. The NLRB eventually deferred to this settlement and dismissed an unfair labor practice Complaint alleging a violation of Section 8(a)(3) of the National Labor Relations Act ("the Act") in the discharge of Berry. The Court of Appeals for the District of Columbia denied Local 520's Petition for Review of that decision.[3]

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3. The procedural history of this case is set forth in Local 520's Petition and will not be repeated herein.

REASONS FOR DENYING THE WRIT

I. *Certiorari* Should Be Denied For The Reason That The Decision Of The District Of Columbia Circuit Court Of Appeals Does Not Conflict With A Decision Of Any Other Circuit Court Of Appeals Or Any Decision Of This Court.

A. *There Is No Conflict With Any Decision Of Any Other Court Of Appeals.*

The holding of the District of Columbia Circuit Court of Appeals ("the D.C. Circuit") was very simply that the NLRB properly deferred to the resolution of Berry's grievance reached after presentations by Catalytic and the UA to the GPC, and the acceptance of that Committee's recommended decision. Local 520's Petition does not refer to a decision of any other Court of Appeals which is inconsistent with that holding, or which holds that it is beyond the authority of the NLRB to defer under appropriate circumstances to such a resolution of a grievance. That absence is understandable, since there is no conflicting Court of Appeals decision.

It appears as though Local 520, however, is contending that the D.C. Circuit's decision effectively rejects, or is inconsistent with, the deferral principles adopted by the NLRB in *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955) and *Olin Corp.*, 268 N.L.R.B. 573 (1984), and which have been generally adopted by the Circuit Courts of Appeals. Local 520's argument is incorrect and, in any event, does not warrant a grant of *certiorari*.

Local 520 first contends that the D.C. Circuit rejected the NLRB's *Spielberg/Olin* criteria for deferral as not supported by a coherent theory. (Petition at 15) Since those criteria have generally been accepted by most of the Circuit Courts of Appeals, therefore, Local 520 argues that the D.C. Circuit's decision in this case creates a conflict among the Circuits. To the contrary,

however, the D.C. Circuit *expressly* followed the *Spielberg/Olin* criteria in analyzing this case, as those criteria have been adapted to apply to the *settlement* of a grievance – as opposed to an arbitration award – in the NLRB's decisions in *Alpha Beta Co.*, 273 N.L.R.B. 1546 (1985), *petition for review denied sub nom. Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987), and *United States Postal Service*, 300 N.L.R.B. No. 23 (1990). *Plumbers and Pipefitters v. NLRB*, 955 F.2d 744, 750-52 (D.C. Cir. 1992). There is thus no conflict among the Circuits created by the D.C. Circuit's decision, and thus no basis for a grant of *certiorari*.

The D.C. Circuit's decision, however, did question whether the "palpably wrong" prong of the *Alpha Beta* test, as applied by the NLRB, is supported by a "coherent theory." 955 F.2d at 755-57. Specifically, the D.C. Circuit expressed its concern that the "palpably wrong" factor may in some cases make no sense in the context of a potential deferral to the *settlement* of a grievance insofar as that factor *requires* some compromise on the part of the union and the employer. As the D.C. Circuit pointed out, in those situations where the employee right in question is not waivable, there can be no compromise to which the Board could conceivably defer. 955 F.2d at 756. Since the D.C. Circuit concluded that Berry's statutory rights in this case were clearly waivable, as conceded by Local 520, and because the other factors in this case clearly supported deferral, the D.C. Circuit was not required to address its concerns in the context of this case. It simply suggested that the Board "give serious consideration" to this issue in the future. 955 F.2d at 757. There is thus no basis for granting *certiorari* on an issue which was not even addressed in the holding below.

Local 520 also suggests in its Petition that the D.C. Circuit rejected the "palpably wrong" analysis of the Board, and, "by implication," therefore, rejected the *Spielberg/Olin* factor of "clearly repugnant to the purposes of the Act." (Petition at 24-25) Local 520 is once

again incorrect. The D.C. Circuit did not reject the "palpably wrong" analysis, and, to the contrary, specifically applied it to the facts of this case. As discussed above, the D.C. Circuit simply questioned that factor's theoretical underpinnings.

Finally, Local 520 argues that the D.C. Circuit's decision was wrong because its ultimate result is that an employee's statutory Section 8(a)(3) rights can be waived by a union with no recourse on the part of the individual employee other than the institution of a suit against the union alleging a breach of the duty of fair representation. (Petition at 25-26) Even assuming Local 520 is correct in this observation, it is obviously not a sufficient basis for granting the Petition, since it does not address or refer to any *conflict among the Circuits* on the underlying legal issue.

In fact, however, the D.C. Circuit's conclusion that Berry's rights were subject to waiver by the UA is accurate. Both the courts and the Board have consistently held that a collective bargaining representative has the authority to compromise or waive many individual employee rights, both contractual and statutory, but subject always to the union's obligation to comply with its duty of fair representation. *See, e.g.*, *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Vaca v. Sipes*, 386 U.S. 171 (1967). The simple issue presented by this case is whether a settlement reached by an employer and a union of an individual employee's grievance may, under appropriate circumstances, be subject to deferral by the NLRB when that individual employee files an unfair labor practice charge. The D.C. Circuit in this case, the NLRB, and the Ninth Circuit Court of Appeals have all concluded that deferral can be appropriate in those circumstances. *Alpha Beta*, *supra*; *Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987); *United States Postal Service*, *supra*. In so doing, the courts and the Board have properly considered the important interests of preserving the Board's jurisdiction to remedy unfair labor practices, and at the same time recognized and

facilitated the public policy of encouraging private resolution of labor disputes. *See Vaca v. Sipes*, *supra*; 29 U.S.C. §173(d). Regardless of whether Local 520 feels that the balance has been properly struck in this case, or in the other cases in which deferral to a settlement has been permitted, this case is not one in which a grant of *certiorari* is warranted because of any conflict among the Circuits.

B. *The D.C. Circuit's Decision Is Not In Conflict With This Court's Decision In Metropolitan Edison Co.*

In *Metropolitan Edison Co. v. NLRB*, *supra*, this Court held that certain of an employee's individual rights under the Act may be waived by his union representative under appropriate circumstances, including rights that would give rise to a claim under Section 8(a)(3). 460 U.S. at 706-07. Accordingly, in holding that the NLRB properly deferred to the resolution of Berry's grievance, the D.C. Circuit's decision did not conflict in any fashion with the holding in *Metropolitan Edison*.

Local 520 apparently concedes this point, because its Petition argues that the decision below was inconsistent with *Metropolitan Edison* only because the waiver of Berry's rights in this case was not "explicitly stated," in the sense that no waiver appears in either the collective bargaining agreement or in the grievance resolution. (Petition at 31) Local 520's argument misses the point of *Metropolitan Edison*. In that case, this Court stated only that it will not infer the waiver of a statutorily protected right from a general contractual provision. 460 U.S. at 708. The Court, therefore, rejected the employer's argument in that case that the union's silence in the face of prior arbitration decisions constituted a waiver of statutory rights of the union stewards. In this case, to the extent that there was any waiver of Berry's rights, that waiver was manifested clearly, unequivocally, and unmistakably by the International's decision to accept the GPC recommendation, and to decline to proceed to arbitration.

To the extent Local 520 is contending in the Petition that the D.C. Circuit's decision conflicts with *Metropolitan Edison* insofar as it holds that the UA possessed the *authority* to waive statutory rights of Berry, that contention is wrong. This Court specifically held in *Metropolitan Edison* that a union *does* have the authority to waive such rights, subject to its duty of fair representation. 460 U.S. at 706-07. The D.C. Circuit's conclusion, therefore, that the UA was empowered to accept the recommended resolution of Berry's grievance, despite objections from Local 520 and Berry, was not in conflict with *Metropolitan Edison*. The Petition should, therefore, be denied.

II. The Petition Should Be Denied For The Reason That The Decision Of The D.C. Circuit Was Fully Consistent With The Accepted And Usual Course Of Judicial Proceedings, Was Correctly Decided, And Does Not Call For An Exercise Of This Court's Power Of Supervision.

The final argument made by Local 520 in the Petition is unabashedly directed to the merits of the D.C. Circuit opinion. (Petition at 35-44) Local 520 in that argument effectively urges this Court to grant the Petition because of Local 520's belief that the decision was plainly incorrect. It was incorrect, according to Local 520, because the NLRB may never defer to a settlement reached during the course of grievance proceedings and, even if it can defer under certain circumstances, this case did not present those circumstances. However, this Court has consistently held that it does not "grant a *certiorari* to review evidence and discuss specific facts." *U.S. v. Johnson*, 268 U.S. 220, 227 (1925), and the Petition should, therefore, be denied.

Although it is not expressly stated, in making these arguments Local 520 is presumably relying on Rule 10.1(a) of this Court's Rules of Procedure, which states that *certiorari* may be granted where a federal Court of Appeals "has so far departed from the accepted and

usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Assuming Local 520 is making that argument indirectly, that standard is not met in this case.

The argument that the NLRB should *never* defer to the settlement of a grievance reached by an employer and a union through the process of collective bargaining is patently frivolous. In Section 203(d) of the Labor Management Relations Act, 29 U.S.C. §173(d), Congress declared that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 562-63 (1976). This Court relied upon that statutory provision in *Vaca v. Sipes*, *supra*, 386 U.S. at 191-92, in holding that a union has discretion to decline to proceed to arbitration on an individual employee grievance, subject to compliance with the union's duty of fair representation. In so holding, this Court emphasized that the utility of the grievance mechanism under a collective bargaining agreement would be severely undermined if the parties to the agreement lacked the power to settle grievances short of arbitration. 386 U.S. at 193.

In *Olin Corp.*, *supra*, the Board relied upon these same principles, including Section 203(d), in reemphasizing the principle that the Board will defer to an arbitration award where the unfair labor practice issue and the contractual issue are factually parallel, and where the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. 268 N.L.R.B. at 574. The Board in *Olin strengthened* the deferral principle originally articulated in *Spielberg Mfg. Co.*, *supra*, by additionally holding that an arbitrator's award will not be regarded as "clearly repugnant" to the Act unless it is "palpably wrong," meaning that the decision is not susceptible to an interpretation consistent

with the Act. *Id.* In establishing these principles, the Board expressly concluded that its approach was "more consistent with the goals of national labor policy," and noted the frequent criticisms of the Board by the Circuit Courts of Appeals in certain cases where the Board had declined to defer to an arbitration award. 268 N.L.R.B. at 575-76.

In *Alpha Beta Co., supra*, the NLRB extended the deferral principle to settlements arrived at in the grievance procedure, again *expressly* "because they further the national labor policy which favors private resolution of labor disputes." 273 N.L.R.B. at 1547. The *Alpha Beta* principle was further extended in *United States Postal Service, supra*, where the Board deferred to the settlement of an individual employee's grievance even though the individual employee failed to consent to the settlement.

Thus, it is abundantly clear that deferral by the NLRB to the settlement of an individual employee's grievance, subject always to the union's duty of fair representation, is both consistent with and furthers the federal labor policy encouraging the resolution of industrial disputes through a procedure agreed upon by the parties. Indeed, deferral will affirm the important role of labor unions in enforcing and administering the collective bargaining agreement, a role which has long been upheld and encouraged by this Court. *See, e.g., Metropolitan Edison Co., supra*, 460 U.S. at 706-07; *Humphrey v. Moore*, 375 U.S. 335, 349 (1964); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 339 (1953).[4]

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4. Deferral is particularly appropriate in this case. The GPA's history, purposes and language all emphasize the necessity for uniformity in its interpretation so as to permit unionized contractors to remain competitive in the continuous maintenance industry. The conduct of Berry which was presented to the GPC implicated not only what he viewed as his individual rights but also the relationship with the site owner, PECO, and PECO's desire and need to conduct its business without interruption. It is precisely these types of delicate balancing decisions which are best left to the parties to

Local 520's quarrel with the merits of the decision of the D.C. Circuit is equally baseless. Berry's grievance was thoroughly investigated by competent International union representatives, Berry participated in the investigation of the case and in the preparation of his presentation to the GPC, and his position, along with that of Catalytic, was fully and adequately presented to the GPC. The GPC is a body composed *solely* of International union representatives, who are familiar with the continuous maintenance industry and are charged with the administration of the GPA on a day-to-day basis. The GPC considered the identical facts which were presented in connection with Berry's unfair labor practice charge, and recommended an acceptable resolution of the dispute. As the D.C. Circuit properly concluded, therefore, all of the factors mandated by *Spielberg*, *Olin* and *Alpha Beta* were met.

Berry's principal arguments attacking the D.C. Circuit's decision are (1) that there was effectively no compromise of the grievance because Berry claims he had been told five months earlier that he was eligible for rehire, and (2) that the International's decision to compromise the grievance might have been tainted by a desire on the part of the International to further other interests. (Petition at 39-41) As to the first point, both the NLRB and the D.C. Circuit disagreed with Local 520's factual contention, and this Court does not sit as a fact-finding body.[5] *See U.S. v. Johnson*, *supra*. There is clearly no reason to do so in this case.

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the contract to resolve – for the ultimate good of *all* affected employees, unions and contractors – through the deferral principle.

5. Local 520 advanced this same proposition in the D.C. Circuit, but provided no record citation for it. In fact, the record shows that Berry was discharged for gross insubordination which, under the applicable Project Rules, made him ineligible for rehire for the length of the project, subject to an annual review. After his discharge, Berry twice attempted to gain access to the work site, and was twice turned down, thereby negating any contention that he was eligible for rehire absent the settlement.

As to Local 520's second contention, regardless of its factual accuracy, this Court has long held that a union has a "wide range of reasonableness" in processing its members' grievances, and that a union may, subject to its duty of fair representation, at times sacrifice the interests of one member or a group of members in order to achieve other bargaining goals. *Ford Motor Co. v. Huffman*, *supra*, 345 U.S. at 338.

This case, therefore, simply does not call for the exercise of this Court's power of supervision, an extraordinary remedy reserved for extraordinary cases.

CONCLUSION

The decision of the District of Columbia Circuit Court of Appeals was fully consistent with federal labor policy, and the applicable decisions of this Court, the National Labor Relations Board, and the other Circuit Courts of Appeals. Local 520's attack on the decision is factually specific, and effectively raises issues which are of importance solely to Local 520 and to Berry. There are thus no special or important reasons favoring an exercise of this Court's discretionary power of review. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the Brief of Respondent Catalytic, Inc. in Oppositon to Petition for Writ of Certiorari were served upon the following counsel for the parties to this proceeding by first class mail, postage prepaid, on June 10, 1992:

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